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## 1. Introduction

This newsletter addresses the situation Japanese investors in Myanmar are currently facing in light of the *coup d'état* of 1 February 2021 and its aftermath. While the world's focus understandably is on the human rights situation in Myanmar, the issue also impacts international companies conducting business in Myanmar. Governments and non-governmental organizations are monitoring human rights compliance by businesses, particularly in the context of environmental, social, and governance (“**ESG**”) standards. International consumers are likewise increasingly aware of the provenance of products or services they consume.

This creates new challenges for Japanese companies with respect to their supply chains, but also for their own investments overseas. According to several news reports, one Japanese enterprise announced in early December 2021 that it had initiated commercial arbitration proceedings against its local Myanmar joint venture partner with the aim of terminating its joint venture partnership in Myanmar. This public announcement constitutes a rare instance of a business touting the initiation of arbitral proceedings, considering that companies often prefer arbitration as a dispute resolution mechanism that preserves the confidentiality of the dispute.

This newsletter addresses the extraordinary situation in Myanmar and highlights some general considerations and options available to Japanese companies. It will also showcase potential remedies Japanese investors have at their disposal under the international investment protection mechanism in place between Japan and Myanmar.

## 2. Escaping a Potential Human Rights Dilemma

On 1 February 2021, Myanmar's military staged a *coup d'état* seizing power from the democratically elected Government, declared a state of emergency and voided the results of the November 2020 election. The *coup d'état* was widely criticized by Western governments, and it quickly became apparent that sanctions might be imposed against those deemed responsible, i.e. the Myanmar armed forces and everyone connected to them.<sup>1</sup>

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<sup>1</sup> On the risk of sanctions and what this means for companies, see for example, the N&A Newsletter, Mitigating the Risk That Your Business May Be Subject to Potential Myanmar Sanctions, 10 February 2021, at [https://www.nishimura.com/en/newsletters/asia\\_210210.html](https://www.nishimura.com/en/newsletters/asia_210210.html).

The European Union and the United States, for instance,<sup>2</sup> have now imposed sanctions for “*the ensuing repression against peaceful demonstrators*”, “*undermining democracy and the rule of law*” and for “*serious human rights violations in the country*”.<sup>3</sup> Given that it is unclear how the situation will develop, one cannot rule out additional sanctions and a deterioration of the human rights situation in the country. In light of these possibilities, Japanese investors operating in Myanmar will have to carefully reconsider any real or potential business ties with Myanmar’s military or entities that are controlled by or connected to it.

Foreign companies operating in Myanmar have already become the target of ESG complaints. For example, Norwegian telecom provider Telenor came under pressure for alleged human rights violations and decided to completely divest from its business in Myanmar.<sup>4</sup> Telenor explained that its decision to leave the Burmese market following the military takeover was based on increasing pressure from Myanmar’s authorities to activate intercept technology subject to Norwegian and European sanctions, compliance with which would make it impossible to adhere to international law, human rights and its own values and policies. Despite its decision to stop investing in Myanmar, it is currently the subject of a complaint to the Norwegian National Contact Point (NCP) for the Organization for Economic Co-operation and Development (OECD) filed by 474 anonymous Myanmar-based civil society organizations.

Business activities in Myanmar, particularly those with a connection to Myanmar’s armed forces, have been subject to increased public scrutiny and discussion. Japanese companies investing in Myanmar, particularly in this context, must carefully review their business strategies and partners to avoid real or perceived contributions to human rights abuses, ESG shortcomings, or any other causes for sanctions. This evaluation has to be conducted on a case-by-case basis as there is no one solution that fits all business situations. Accordingly, many Japanese companies have been carefully following the events and have diligently undertaken such assessments following the military *coup*.<sup>5</sup>

It has been reported that the aforementioned Japanese company aims to terminate its current joint venture with its local partner by way of arbitration proceedings, because said partner is said to provide welfare fund management services for the military. We understand the Japanese company plans to continue its business in Myanmar with a different local joint venture partner without military ties.

Companies will also want to evaluate their continued involvement in Myanmar against the backdrop of what an overall exit from the market would mean for local employees and the Burmese population. While remaining in Myanmar entails significant challenges for Japanese investors, a continued involvement may contribute to a strengthening of the human rights situation and the well-being of local employees, business partners and the society at large.

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<sup>2</sup> U.S. Department of State, Burma Sanctions, at <https://www.state.gov/burma-sanctions/>.

<sup>3</sup> European Council of the European Union Press Release, Myanmar/Burma: third round of EU sanctions over the military coup and subsequent repression, 21 June 2021, at <https://www.consilium.europa.eu/en/press/press-releases/2021/06/21/myanmar-burma-third-round-of-eu-sanctions-over-the-military-coup-and-subsequent-repression/>.

<sup>4</sup> Telenor Group, Update on the ongoing OECD complaint against Telenor on the sale of Telenor Myanmar, 27 September 2021, at <https://www.telenor.com/media/announcement/update-on-the-ongoing-oecd-complaint-against-telenor-on-the-sale-of-telenor-myanmar-27-september-2021>.

<sup>5</sup> N&A Tokyo’s trade team and N&A’s Yangon office have advised several clients with respect to sanctions and the overall challenges companies face in Myanmar.

### 3. Revisiting Existing Contracts

Any review of a company's current position in Myanmar will entail an assessment of the contractual framework to which that company is subject. This involves the structure of the investment, collaboration with local partners, and the payment regime in place. It is generally in the interest of investors to restructure their business in close collaboration with their existing partners. Where an amicable solution does not seem possible, the contract's dispute resolution mechanism may constitute an avenue to effectively push for necessary changes.

The importance of a robust dispute resolution mechanism cannot be understated. The aforementioned Japanese company reportedly failed in its efforts to purchase the local partner's joint venture share and continue its Myanmar business with a different non-military affiliated local partner. It, however, is able to rely on an arbitration clause in the joint venture contract to initiate international proceedings to resolve the existing dispute. Absent such clause, the Japanese company would have been forced to file its dispute in a Burmese court – against a joint venture partner backed by a military which has taken control of all levels of the Government.

A review of existing business structures and potential changes to them should therefore always include the analysis of existing dispute resolution mechanisms, in order to be able to assess the full panoply of options.

### 4. Investment Protection and its Enforcement

Less obvious than the review of contractual relationships is – at least for some Japanese investors conducting business overseas – the potential application of investment protection provisions. Japanese investors and their investments are protected against an abuse of power by the Government of Myanmar (whether democratically elected or led by a military junta) by way of the Agreement between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalisation, Promotion and Protection of Investment of 15 December 2013, in force since 7 August 2014 (“**Japan-Myanmar BIT**”).<sup>6</sup>

While an arbitration as described above concerns the contractual relationship between a Japanese investor and its local business partner, a BIT protects Japanese investments against interference by the Myanmar Government, if its actions (or actions attributable to it) violate the protection provisions included in the Japan-Myanmar BIT.

One provision of particular interest for Japanese businesses in Myanmar will be the so-called fair and equitable treatment (“**FET**”) standard in Article 4 of the Japan-Myanmar BIT. The FET standard protects Japanese investments in Myanmar against unfair and unequal treatment by the Government of Myanmar. While this standard seems somewhat vague, it basically addresses (a) unreasonable, arbitrary and discriminatory treatment; (b) failure to offer a stable and predictable legal framework; (c) lack of transparency and denial of due process and justice; and (d) frustration of an investor's legitimate expectations. Another important provision is Article 13 of the Japan-Myanmar BIT, which requires Myanmar to pay prompt, adequate and effective compensation to a Japanese investor in case it expropriates or nationalizes the investor's investment.

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<sup>6</sup> For the sake of simplicity, this Newsletter focuses on the Japan-Myanmar BIT. It needs to be kept in mind that the Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations (“**AJCEP**”) provides an additional framework between Myanmar and Japan for both substantive and procedural investment protection.

Apart from such substantive protections, the Japan-Myanmar BIT under Article 18 allows a Japanese investor to initiate an arbitration against Myanmar in order to have an independent and neutral arbitral tribunal decide on an alleged violation of the BIT. Before an investor can initiate such arbitration, both the investor and the Government of Myanmar are to engage in amicable consultations for at least three months.

Investors should be aware that they cannot postpone a decision on taking action under the Japan-Myanmar BIT indefinitely. The BIT contains a statute of limitations clause barring investors from bringing an investment arbitration if more than three years have elapsed from the time an investor first acquired knowledge of its incurred loss or damage.

Japanese businesses need to be aware that sometimes just the prospect of an investment arbitration can lead a State to reconsider its position. Our practice has seen cases in which the serious prospect of an investment arbitration led the State to agree to a negotiated solution favorable for the investor. The fact that the investor would be directly negotiating with the central government may eliminate the need to talk to different ministries or entities that might be pursuing diverging interests and agendas.

## 5. Conclusion


Japanese investors in Myanmar face an extraordinary situation after Myanmar's military took control over all levels of the Government in early 2021. Businesses investing or operating in Myanmar should therefore diligently review their business strategy and reconsider their business partners as well as other potential pitfalls. Such assessment starts with the existing contractual framework.

Existing investment protection provisions between Japan and Myanmar provide for additional safeguards for Japanese investors in case they have suffered harm by an action by the Burmese Government or any entity whose actions may be attributed to Myanmar for the purpose of the Japan-Myanmar BIT.

For further information, please feel free to watch an exclusive [N&A webinar on investment-arbitration \(in Japanese\)](#) for an introduction to the practice of investment arbitration.<sup>7</sup>

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<sup>7</sup> N&A Legal Forum Online, Investment Arbitration Webinar Series, at <https://www.nishimura.com/ja/seminars/LFO20210421.html>.